84-1044

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY
Appellant,

v.

PUBLIC UTILITIES COMMISSION of the
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT AND APPENDIX THERETO OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the fund solicitation messages of a third-party?

THE PARTIES TO THIS PROCEEDING

The parties to this proceeding are: (1) Pacific Gas and Electric Company* (hereinafter "PGandE") (Appellant); (2) Public Utilities Commission of the State of California (hereinafter "CPUC" or "commission"); (3) Toward Utility Rate Normalization (hereinafter "TURN") (the real party in interest); (4) California Association of Utility Shareholders (hereinafter "CAUS") (Intervenor) and (5) Center for Law in the Public Interest (Intervenor).

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* PGandE is not owned by any parent company. The following is a list of PGandE's subsidiaries and affiliates and the percentage of each that PGandE owns:

Alberta Natural Gas Company Ltd (24.61%)[a]; ANGUS Chemical Company (34.90%)[a]; ANGUS Fine Chemicals Ltd. (27.92%)[a]; Angus Chemie GmbH. (34.90)[a]; ANGUS Petroleum Corporation (45.06%)[a]; Foothills Pipe Lines (South B.C.) Ltd. (12.06%)[a]; Pacific Gas Transmission Company (PGT) (50.17%)[a]; Pacific Indonesia LNG Company (50.00%); Pacific Transmission Supply Company (50.17%)[a]; Rocky Mountain Gas Transmission Company (50.17%)[a]; Standard Pacific Gas Line Incorporated (85.71%).

(a) Pacific Gas and Electric Company has an indirect interest in Alberta Natural Gas Company Ltd, ANGUS Chemical Company, ANGUS Fine Chemicals Ltd., ANGUS Chemie GmbH., ANGUS Petroleum Corporation, Foothills Pipe Lines (South B.C) Ltd., Pacific Transmission Supply Company, and Rocky Mountain Gas Transmission Company through its majority ownership of Pacific Gas Transmission Company. Pacific Gas Transmission Company owns 49.05% of Alberta Natural Gas Company Ltd, 42.16% of ANGUS Chemical Company and ANGUS Chemie GmbH., 33.73% of ANGUS fine Chemicals Ltd., 80% of ANGUS Petroleum Corporation, and 100% of Pacific Transmission Supply Company and Rocky Mountain Gas Transmission Company. Alberta Natural Gas Company Ltd owns 55.88% of ANGUS Chemical Company, 20% of ANGUS Petroleum Corporation, and 49% of Foothills Pipe Lines (South B.C.) Ltd. ANGUS Chemical Company owns 100% of ANGUS Chemie GmbH. and 80% of ANGUS Fine Chemicals Ltd.

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PGandE appeals from the final judgment of the Supreme Court of California denying a Writ of Review of a decision of the CPUC holding that appellant's right of free speech guaranteed by the First Amendment of the United States Constitution is not violated by its regulatory order compelling appellant to publish the messages of a third-party in its monthly billing envelope. Appellant appeals on the basis that the order of the CPUC is unconstitutional in that it violates appellant's right of free speech as guaranteed by the First Amendment of the United States Constitution.

OPINION BELOW

The denial of the Writ of Review by the Supreme Court of California, which appears in the Appendix hereto page 73 *infra*, is not reported. The opinions of the CPUC dated December 20, 1983, (*TURN* v. *PGandE*, Decision No. 83-12-047, slip op., (Cal.PUC, Dec. 20, 1983) as modified on May 2, 1984, *TURN* v. *PGandE*, Decision No. 84-05-039, slip op., (Cal.PUC, May 2, 1984)) are printed in the appendix hereto, pages 1-61 *infra*.

JURISDICTION

The judgment of the Supreme Court of California, denying appellant's Writ of Review, was entered on October 4, 1984. A Notice of Appeal to this Court was duly filed in the Supreme Court of California on November 5, 1984. (See app., p. 74.) The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257, subdivision (2). (See also, *Atchinson Railway Co.* v. *Public Utilities Commission*, 346 U.S. 346, 348-349, (1953).)[1]

This appeal is being docketed in this Court within 90 days from the denial of the Writ of Review below.

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[1] This case involved an appeal from an order of the Public Utilities Commission of California. The California Supreme Court denied review, and the appellant appealed to this Court. In deciding the commission's order was equivalent to an act of the legislature for appeal purposes, the Court related:

> We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. § 1257(2) (1948). *Live Oak Water Users' Assn.* v. *Railroad Commission*, 269 U.S. 354, 356; *Lake Erie & Western R. Co.* v. *Public Utilities Commission*, 249 U.S. 422, 424. The Commission has construed § 1202 as authorizing these orders. The appellants presented squarely to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. (citation omitted) (*Atchinson Railroad Co.* v. *Public Utilities Commission*, 346 U.S. 346, 348-349 (1953).)

Similar to *Atchinson Railway*, here, the commission has construed California constitutional and statutory authority as authorizing it to compel appellant to open its billing envelope to a third party. (Dec. No. 83-12-047, slip op., at 35, (Cal.PUC, Dec. 20, 1983); app., pp. 26-27.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article XII, Section 5 of the Constitution of the State of California:

> The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

Article XII, Section 6 of the Constitution of the State of California:

> The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Section 701 of the California Public Utilities Code:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

STATEMENT OF THE CASE

Factual Background

Appellant is regulated by appellee, the Public Utilities Commission of the State of California, which was established pursuant to Article XII of the California Constitution. Charged

with the duties and authorities that the Legislature has delegated to it in the Public Utilities Code of California, (Cal.Const., art. XII § 5) appellee's primary function is to regulate the rates and quality of services of utilities, including appellant.

One of the world's largest investor-owned, combined gas and electric utilities, appellant, incorporated in 1905, serves 48 of California's 58 counties (electric-47, gas-37). 3.6 million electric customers and 2.9 million gas customers receive service from appellant. Appellant has a responsibility to communicate with these customers on numerous matters, including appellant's ability to provide reliable and efficient service.

As a necessary adjunct to providing utility service, appellant, since December 1923, has published a monthly newsletter called *PGandE Progress (Progress)*. This publication is appellant's primary means of communicating with its customers. Through *Progress,* conservation messages and suggestions are conveyed, rate charges explained, and questions of general concern are answered. In addition, *Progress* occasionally carries articles that are unrelated to appellant's business, but are of general public interest. (See app., pp. 183-190.)

Progress is currently circulated to 3.7 million households. It is mailed each month to customers in the billing envelope at no additional cost to ratepayers. The cost of printing *Progress* is borne by stockholders and is not one of the estimated costs used to calculate rates.[2]

Under existing United States postal regulation, a bill must be sent by first-class mail at a cost of sixteen and one-half (16.5¢) to seventeen (17¢) cents.[3] For this cost, which is the minimum first-class rate, up to one ounce of material may be included in the envelope. A bill, even though weighing less than one ounce, cannot be mailed for less than the first-class rate.

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[2] A recent edition of *Progress* is included in the appendix hereto, pages 183-192 *infra*.

[3] The 17 cents postage charge applies to mail that is presorted by six digit zip code. The 16.5 cents postage charge applies to mail presorted by nine digit zip code.

Included with each mailing is the bill itself, the envelope in which it is mailed to the customer, a self-addressed return envelope in which the customer can return payment to PGandE, and an occasional legal notice. Because these items weigh less than one ounce, appellant, for the last sixty (60) years, has included *Progress* in its billing envelope without incurring any additional costs.

State Proceedings

The present case has its origin in appellant's 1982 general rate case, Application No. 60153, et. al. In that proceeding, Toward Utility Rate Normalization (TURN), a frequent intervenor in appellant's rate proceedings, contended that PGandE had violated 16 United States Code, section 2623, subsection (b)(5) and 16 United States Code, section 2625, subsection (h) of the Public Utility Regulatory Policies Act (PURPA) by including political communications in its billing envelope and in the envelope used to mail dividends to appellant's shareholders.

In *PGandE,* Decision No. 93887, 7 CPUC 2d 349 (1981) modified by *PGandE,* Decision No. 82-03-047, slip op. (Cal.PUC, Mar. 2, 1982)[4] the commission found that from time to time *Progress* contained items that could be considered political comment. (Dec. No. 93887, slip op. at pp. 158-59; app., pp. 64-65.) The CPUC, although recognizing that *Progress* is printed at shareholder expense and is sent in the envelope without additional cost to the ratepayer, nevertheless concluded that there are or may be many other uses for the "extra space."[5] Since *Progress* is sent in the envelope, the CPUC decided that the ratepayers lose the "opportunity cost" of using the envelope. (Dec. No. 93887, slip op., at 159c; app., p. 68.) In findings of fact number 58, the commission held that the "extra space" in the envelope is properly considered as ratepayer property. (Dec. No. 93887, slip op. at p. 220; app., p. 72.)

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[4] The pertinent portions of Decision No. 93887, slip op. (Cal.PUC, Dec. 30, 1981) are reprinted in the appendix hereto, p. 63 *infra*.

[5] Specifically, the commission defined: "extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." (Dec. No. 83-12-047, slip op., at p. 4; app., p. 3.)

The CPUC then examined how the extra space could be used more efficiently so ratepayers could realize this "opportunity cost". It considered: (1) banning the *Progress;* (2) establishing a "public access mechanism" requiring the utility to allow TURN or other groups to reply to political messages; (3) charging PGandE a fee for use of the extra space whenever the Company engaged in political speech; or (4) auctioning off the extra space to the "highest reputable commercial advertiser." (Dec. No. 93887, slip op., at pp. 159d-159f; app., pp. 66-71.) The commission did not, however, choose any of these "solutions."[6] Rather it invited:

> . . . TURN or any other interested party to file an application with this Commission with a proposed solution to the 'extra' space problem. *The application would seek an order from us to the utilities, such as PGandE, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit.* We caution, however, that we will not lightly adopt such an order and that *the considerable First Amendment problems must be fully addressed* in such application. (*Id.,* slip op., at 159g; app., p. 71.) (emphasis added).

On May 31, 1983, TURN filed a complaint with the CPUC (Docket No. 83-05-13) requesting access to appellant's billing envelope no fewer than four times per year for a two year period for the purpose of including a Consumer Advocacy

[6] Shortly after issuing Decision No. 93887, the commission granted a request to use the extra space in the billing envelopes of San Diego Gas and Electric Company (SDG&E) to solicit funds and create a consumer group to be called the San Diego Utility Consumers Action Network, Inc. (UCAN). (*Center For Public Interest Law* v. *SDG&E,* Decision No. 83-04-020, slip op., (Cal.PUC, Apr. 6, 1983), app., p. 90; (hereinafter the "UCAN Decision").) Several utilities sought to intervene in this case, but the commission denied their requests.

In reaching its decision in the UCAN case, the commission stated that the right involved is not so much a property right as an "equity right." (*Id.*, at 14; app., p. 100.) Although stating that not everything paid for with ratepayer money is the sole property of the ratepayer, the commission did not give any guidance as to which payments give the ratepayers an equity interest in utility property and which do not. (*Id.*, at 14; app., p. 100.)

Checkoff proposal.[7] (TURN's complaint is reprinted in the appendix hereto, pp. 75-89.) The "Consumer Advocacy Checkoff" proposal was open *only* to qualified organizations representing residential customers, and any funds so acquired would have to be used in PGandE proceedings. (app., p. 82.) On August 8, 1983, appellant filed its motion to dismiss TURN's complaint contending, *inter alia,* that the requested relief was unconstitutional because it would violate appellant's rights protected by the First, Fifth and Fourteenth Amendments of the United States Constitution. The motion was denied by the commission.

On December 20, 1983, by a 4 to 1 vote, the commission issued Decision No. 83-12-047 (slip op., (Cal.PUC, Dec. 20, 1983)) declining to adopt two of TURN's Consumer Advocacy Checkoff proposals, but granting TURN access to appellant's billing envelope four times per year for a two year period.[8] During such time, TURN's message must be accorded a priority position over *Progress.* (Dec. No. 84-05-039, slip op., (Cal.PUC, May 2, 1984); app., p. 45.)

Decision No. 83-12-047 attempts to explain more clearly the commission's ephemeral view of the ratepayer's interest in the extra space in the billing envelope. First, the commission stated that it had not really held that the billing envelope itself is ratepayer property. (Dec. No. 83-12-047; slip op., at p. 4; app., pp. 3-4.) Rather, it surmised that the extra space in the envelope is more like an "artifact", generated with ratepayer funds which has economic value. (*Id.,* at 5; app., p. 3.) And, to prevent appellant from benefitting from this economic value,

[7] TURN proposed three types of checkoff alternatives. The first two require the listing of various qualified consumer organizations. The main difference in the first two alternatives is the manner in which the qualified organizations are selected. The third alternative is less in the nature of a checkoff. Under this alternative, only TURN is allowed to solicit funds. (app., pp. 85-86.)

[8] The commission found that it would be premature to adopt the checkoff proposals since only TURN had sought access to the PGandE billing envelope. Therefore, the commission stated that two of the three checkoff proposals outlined by TURN in its complaint were "neither necessary nor practical." (Dec. No. 83-12-047, slip op., at p. 22; app., p. 17.)

reasoned the commission, the extra space, as a matter of equity, "is properly considered as ratepayer property." (*Id.*, at 5; app. p. 3.) Moreover, continued the commission, because of its past practice of requiring utilities to send legal, conservation, tax and rate notices in the billing envelopes, it had jurisdiction over the envelope extra space. (Dec. 84-05-039, slip op., at pp. 2-4; app., p. 47.) Specifically, the commission construed Article XII, Sections 5 and 6 of the California Constitution and California Public Utilities Code Section 701 as the constitutional and statutory authority for its order. (Dec. No. 83-12-047, slip op., at p. 35; app., p. 26-27.)

Then, relying on its UCAN Decision, the commission summarily rejected PGandE's First Amendment claims.[9] The commission held its action was a valid time, place and manner restriction, that the space belongs to the ratepayers and that its order was a narrowly-tailored means of serving the compelling state interest identified in the UCAN proceeding. (Dec. 83-12-047, slip op. at pp. 27-30; app., pp. 20-22.) Asserting that the envelope space is the ratepayers' property, not appellant's, the commission dismissed the Fifth Amendment taking issue. (*Id.*, at 36; app., p. 27.)

Applications for rehearing were filed by appellant and a number of other interested parties. On March 7, 1984, the commission issued Decision No. 84-03-045, extending its stay of the effectiveness of Decision No. 83-12-047. Thereafter, on May 2, 1984, by a 3-2 vote, the CPUC issued Decision No. 84-05-039 modifying Decision No. 83-12-047 and denying the requests for a new hearing. On June 4, 1984, appellant filed its Petition For Writ of Review with the Supreme Court of California challenging the constitutionality of the order. A

[9] Decision Numbers 83-12-047; (app., pp. 1-44) and 84-05-039; (app., pp. 45-61) are rife with references to the UCAN Decision. For example, Decision No. 83-12-047 adopts the so-called "compelling state interest" from the UCAN Decision. Decision No. 84-05-039 also quotes extensively from the UCAN Decision. This was done even though the commission specifically rejected requests for interventions in the UCAN proceeding by various utilities which alleged that the decision might affect them. The commission assured the utilities that the complaint would "in no way affects the rights and duties of other utilities." (Dec. No. 83-04-020, slip op., at p. 9; app., p. 96.) Despite this assurance, the commission used the UCAN decision as the primary basis for giving TURN access to appellant's billing envelope.

number of other interested parties from throughout the United States filed amici curiae briefs requesting the Supreme Court of California to review the commission's decision. On October 4, 1984, the Supreme Court of California denied, without comment, appellant's Writ of Review. (app., p. 73.)

THE FEDERAL QUESTION WAS RAISED BELOW

At the earliest possible stage of this proceeding, appellant raised the federal issue in a motion to dismiss filed with the commission on August 8, 1983. In that motion, appellant argued that the requested order was unconstitutional because it would violate rights protected by the First, Fifth and Fourteenth Amendments of the United States Constitution. All of appellant's claims were rejected.[10]

Appellant, in its Application for Rehearing filed with the CPUC on January 6, 1984, again raised the federal issues. In that application appellant argued, *inter alia,* that the commission's order was unconstitutional in that it violated the First Amendment of the Constitution of the United States. (*Application of Pacific Gas and Electric Company For Rehearing and Automatic Stay of Decision No.* 83-12-*047,* (1/6/84) pp. 5-8.) The CPUC rejected appellant's arguments and denied the application. Appellant reiterated its claim that the commission's order was unconstitutional in its Petition for Writ of Review filed with the California Supreme Court on June 4, 1984. (See *Petition For Writ of Review With Memorandum of Points And Authorities In Support Thereof,* (6/4/84).) Rather than accepting for review the substantial issues raised by appellant, the Supreme Court of California, on October 4, 1984, issued, without comment, its Order Denying Writ of Review. (app., p. 73.)

[10] Appointed by the Governor, commissioners are not required to have any legal expertise. (Cal. Const. art XII, § 1.) Of the five commissioners deciding this case only one is a member of the California bar, and he dissented from the majority.

REASONS WHY THE QUESTION IS SUBSTANTIAL

I

IMPORTANT CONSTITUTIONAL ISSUES THAT ARE NATIONAL IN SCOPE ARE RAISED BY THE DECISION BELOW

A. The Decision Below Raises Recurring Constitutional Issues Concerning Efforts Of Third Parties To Utilize Utility Billing Envelopes To Mail Their Messages.

The decision below decides constitutional issues of national importance. In several jurisdictions, including New York, Nevada and Oregon, consumer groups are demanding that utilities use the billing envelope to mail their messages. Legal challenges to third-party inserts have been brought (and are being contemplated) by various utilities throughout the nation. For example, Consolidated Edison Company of New York is currently challenging the constitutionality of an order of the New York Public Service Commission compelling Consolidated Edison to grant access to consumer groups mailings in its billing envelopes. (app., pp. 111-141.) On November 6, 1984, the electorate in Oregon approved a ballot initiative which compels Oregon utilities to carry third-party messages six (6) times per year. Failure to include such messages subjects a utility to possible conviction of a Class A misdemeanor. (app., pp. 142-150.)

Forcing utilities to grant consumer organizations access to their billing envelopes raises fundamental constitutional issues affecting every regulated business in the nation. If the utilities' billing envelopes can be made available to consumer organizations, it logically follows that extra utility vehicles, office space, computers and other facilities used to render customer service could also be made available to consumer groups.

B. The Decision Below Conflicts Directly With Decisions Of This Court Limiting The Right Of A State To Regulate A Utility's Billing Envelope And To Regulate Utility Speech.

In *Consolidated Edison Company* v. *Public Service Commission*, 447 U.S. 530 (1980), this Court held that a state must show a compelling state interest before it may regulate what a utility may insert in its billing envelope. Despite this ruling, the

commission below ordered appellant to open its billing envelope for use by a third-party without first demonstrating a compelling state interest for its order.

Following *Consolidated Edison*, this Court decided *Central Hudson Gas and Electric Corporation* v. *Public Service Commission*, 447 U.S. 557 (1980), which made clear that even commercial speech of a utility is protected by the First Amendment if it is lawful and not misleading. (*Id.*, at 566.) A state, under the *Central Hudson* analysis, may not regulate what goes into the billing envelope unless the "asserted governmental interest is substantial." (*Id.*) Moreover, before regulation is permissible the Court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (*Id.*)

As more fully set forth, *infra*, pages 20-22, the commission's order in this case cannot survive the tests set forth in either *Consolidated Edison* or *Central Hudson*.

II

COMPELLING APPELLANT TO PUBLISH THE MESSAGE OF A THIRD-PARTY VIOLATES THE FIRST AMENDMENT.

A. The First Amendment Applies To Utilities.

The First Amendment's implication of forcing a privately-owned public utility to open its billing envelope to third parties to express their views therein is novel and substantial.[11] If, for example, the State of California were to order the Bank of America to include in its monthly checking account statements

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[11] The sharp disagreement on the commission regarding this issue continues. For example, on October 17, 1984, in *Comm. of More Than 1 Million Cal. Taxpayers To Save Prop. 13* v. *PGandE*, Decision No. 84-10-062, slip op., (Cal.PUC, October 17, 1984); app., pp. 157-164), the commissioners denied the request of a political group to insert material into utility billing envelopes. The commissioners concluded that the group should be denied access because: (1) the group did not allege it has participated or intends to participate in commission proceedings; and (2) the political group seeking use of the "extra" space did not allege that the group's use would improve consumer participation in commission proceedings.

In a concurring opinion, one commissioner stated that he would reject the request because he is not convinced that any group is entitled to "invade a

(Footnote continued on following page)

to customers the messages of consumer groups wishing to solicit funds to challenge the bank's practice of charging certain fees for returned checks, there would be no question that the regulation would be unconstitutional. Imposing a similar regulation on utilities is likewise unconstitutional. First Amendment protections extend to all persons, including an investor-owned public utility such as appellant. In *Consolidated Edison Company* v. *Public Service Commission, supra,* a case holding that a state regulatory agency may not ban a utility's bill inserts, this Court left no doubt that a utility, like other corporations, is protected by the First Amendment:

> The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that '[*t*]*he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.* (citation omitted)' (447 U.S. at 533.) (emphasis added).

B. Appellant's First Amendment Rights Have Been Abridged.

1. Introduction

The commission's decision violates appellant's First Amendment rights in at least three different ways. First, it impairs appellant's right to communicate. Second, by mandating appellant to carry the messages of a third party, the decision forces appellant to associate with a stranger's messages and to speak even though it prefers to remain silent. Third, the decision ensnarls the commission in improper content analysis of competing messages, making government the ultimate arbitrator of what is communicated.

(Footnote continued from previous page)
public utility's billing envelope to convey their messages" and because he believes "other media and forums exist that are better suited to carry those messages. . . ." (*Id.*, Calvo, concurring; app., p. 163). Another commissioner concluded that ". . . I continue to believe that any and all such assignment of envelope space by this Commission to other entities is a deprivation of the constitutional rights of the subject utility companies." (*Id.*, Bagley, concurring; app., p. 164)

2. Appellant's Right To Communicate Has Been Infringed.

By requiring appellant to carry the messages of a stranger in its billing envelope, the commission disrupts and displaces appellant's mode of communicating with its customers utilized for the past 60 years. On at least four (4) occasions per year, the commission is either denying or severely restricting appellant's right to disseminate its own information to its customers. Whether or not appellant will be able to communicate with its customers through its billing envelope during these four months will hinge entirely upon TURN and its decision as to the length of its message or even the weight of paper it uses.

3. The Decision Below Forces Appellant To Associate With TURN's Message, And To Speak Even Though It Prefers To Remain Silent.

The principle that a state may not compel a person to carry a message against his will is firmly established. (*Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Wooley* v. *Maynard,* 430 U.S. 705 (1977)). The right not to speak and not to express or associate with the views of others is an essential part of the First Amendment.[12] (*Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977).)

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[12] By requiring PGandE to send its bill and TURN's message together, the commission has given TURN's message a status it cannot achieve on its own. Sent by itself, TURN's solicitation probably could be easily identified as such from the TURN envelope and quickly discarded or kept based on its own identity. The recipient of appellant's billing envelope, however, will open the envelope and peruse its contents precisely because PGandE is sending the bill in it. Thus, TURN's message receives exposure and consideration it may not garner on its own. Furthermore, third party solicitations also will detract from PGandE's own communications. After receiving a number of such solicitations, the customer may come to expect the envelope to contain third party solicitations and will act accordingly. Consequently, PGandE's messages may suffer from the association.

The commission recognized that there is an "increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately." (Dec. No. 83-12-047, slip op., at p. 4 n.2; app. p. 3. n2.) Even the "increased probability" that customers may read TURN's insert if put in PGandE's envelope is not sufficient justification to abridge PGandE's First Amendment rights. A similar argument in *City Council of Los Angeles* v. *Taxpayers for Vincent,* ___U.S.___ 104 Sup.Ct. 2118, 2133 (1984), that "posting signs on [utility] property has advantages over [other] forms of expression" was rejected as a basis for allowing candidates for political office to place their signs on the city's utility poles.

The *Miami Herald* and *Wooley* cases have a direct bearing on the instant case. In *Miami Herald,* this Court rejected the idea that a state may compel a private person to publish the message of a third party. In that case, a Florida statute required newspapers to grant a right of reply to press criticism of a candidate for nomination or election. The Court specifically rejected the argument that the government has an interest in enforcing a right of access in order to enhance a variety of viewpoints. Chief Justice Burger, writing for the Court, observed:

> . . . The implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years. (*Id.*, at 254.)

The Court went on to hold:

> Compelling editors or publishers to publish that which 'reason' tells them should not be published is what is at issue in this case. *The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specific matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.* (citation omitted) (*Id.*, at 256.) (emphasis added).

Three years later, the Court decided *Wooley* v. *Maynard, supra,* a case in which a person was forced by the State of New Hampshire to display the State's message, "Live Free or Die," on his car's license plate. Like PGandE, the appellant in *Wooley* objected vigorously to carrying the message of a third party. In upholding the right of the appellant not to carry the state's message, the *Wooley* Court explained:

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are*

> *complimentary components of the broader concept of 'individual freedom of mind.'* (citation omitted) (*Id.*, at 714.) (emphasis added).

The prohibition against forcing one to publish a message against his or her will is not limited to the publishing activities of newspapers. Unlike *Miami Herald, Wooley* did not involve a newspaper-type publication. The appellant in *Wooley,* like other motorists licensed in New Hampshire, was forced to display the state's slogan on his automobile license plate. The crux of the *Wooley* decision, as identified by the Supreme Court, was that the state's interest, no matter how acceptable to some, "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." (*Id.*, at 717.) Likewise, in the instant case, the state's interest in providing TURN with an adequate fund raising mechanism cannot outweigh appellant's right not to become the "courier" for TURN's fund-raising messages.

The record below is devoid of any legal basis for forcing appellant to speak when it wishes to remain silent. In *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), Mr. Justice Powell (concurring), citing *Stanley* v. *Georgia,* 394 U.S. 557 (1969), correctly pointed out some of the inherent problems of generalized forced access:

> The same principle may extend to state action that forces individual exposure to third-party messages. Thus, a law that required homeowners to permit speakers to congregate on their front lawns would be a massive and possibly unconstitutional intrusion into personal privacy and freedom of belief. (*Id.*, at 100, n. 4.) (Powell, concurring).

Moreover, continued Mr. Justice Powell: "If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or distribute pamphlets in the entrance area of a store or in a lobby of a private building." (*Id.*, at 99.) Likewise appellant in

the instant case is forced to speak even though it prefers to remain silent. Hence, it is faced with two choices. As put by Mr. Justice Powell:

> The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property, (citation omitted), cannot restore his 'right to refrain from speaking at all. (citation omitted)' (*Id.*, at 99.)

Although the majority in *Pruneyard* upheld the right to petition in a shopping center, they recognized the unique character of a shopping center which "by choice of its owners is not limited to the personal use of [the owners]." (*Id.*, at 87.) Unlike a utility billing envelope, a shopping center "is instead a business establishment that is open to the public to come and go as they please." (*Id.*, at 87.) By contrast, appellant's billing envelopes have always been limited to appellant's private use and occasional commission legal notices. The public has never been invited to express its views therein. Clearly, PGandE's First Amendment rights have been impermissibly abridged because it is not only forced to associate with and be the courier of TURN's message, but also to speak even though it prefers to remain silent.

4. The Commission Improperly Evaluated The Content Of Speech

It is well-established that "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' (citation omitted)" (*Consolidated Edison Co.* v. *Public Service Commission, supra,* 447 U.S. at 536.) The commission has violated this basic tenet by evaluating the relative merits of TURN's messages versus appellant's messages.

The commission readily admits that the primary purpose of the proceeding below was to determine "how to use the economic value of the extra space more efficiently for ratepayers' benefit." (*TURN* v. *PGandE,* Dec. No. 83-12-047, slip op., at p. 28 (Cal.PUC, Dec. 20, 1983); app., p. 21.) And, the commission justified its regulation on the grounds that consumers "will benefit more from exposure to a wide variety of views than they will from only that of PG&E." (*Id.*, at p. 23; app., p. 17.) In *Consolidated Edison,* the New York Public Service Commission "justifie[d] its ban [on utility speech] on the grounds that consumers will benefit from receiving 'useful' information. . . ." (*Id.,* at 537.) Rejecting this assertion, the Court replied: "The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation." (*Id.*) Similarly, the decision below cannot be upheld as a content-neutral time, place, or manner restriction because it impermissibly determines whose speech is more important.

Without evaluating content, the commission could not conclude that sending TURN's inserts would be a more beneficial use of the extra space than allowing PGandE to fully utilize that space. To reach its conclusion, the CPUC either had to weigh the value of TURN's speech versus PGandE's speech, or to make an unsupported determination that TURN's solicitations would be a more efficient use of the extra space. In either case, the commission's action was impermissible. If the CPUC weighed TURN's message against PGandE's, it unlawfully evaluated the merits of the speech of the parties. If it simply proceeded on the supposition that TURN's solicitation is a more beneficial use, then that position is inconsistent with decisions of this Court which place the burden on the commission to demonstrate in the record why inserting TURN's message is a more beneficial use of the extra space.

III

THE STATE'S JUSTIFICATION FOR RESTRICTING APPELLANT'S FIRST AMENDMENT RIGHTS DOES NOT MEET THE COURT'S TEST FOR REGULATING SPEECH.

A. The State Must Demonstrate A Compelling State Interest And May Not Rely On Appellant's Status As A Utility As A Basis For Its Regulation.

This Court has consistently held that when First Amendment rights are abridged the normal presumptions of constitutionality do not apply. (*Thomas* v. *Collins,* 323 U.S. 516 (1945)). The state bears the heavy burden of showing the existence of a compelling governmental interest sufficient to justify the abridgment. (See *Thomas* v. *Collins, supra; Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Schneider* v. *State* (*Town of Irvington*), 308 U.S. (1939).)

This burden was not met in the proceedings below. Even though the record is devoid of evidence demonstrating a compelling state interest for regulating the contents of the billing envelope, the commission, nevertheless, concluded that: "In the present matter a compelling state interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way." (Dec. No. 83-12-047, slip op., at p. 29; app., p. 22.) In fact, the commission does not, and indeed cannot, cite any evidence in the record to support its conclusion. Rather, it relied heavily on appellant's status as a regulated monopoly as a basis for ordering appellant to include TURN's message in the billing envelope. (*Id.,* at 35; app., p. 26-27.)

By doing so, the commission incorrectly assumed that appellant's "monopoly" status diminished the application of the First Amendment. According to the commission: "even assuming that [appellant's] envelope is private property, it must not be forgotten that PG&E is a monopoly utility closely

regulated by this Commission pursuant to the authority derived from the State's constitution."[13] (Dec. No. 83-12-047, slip op., at 35; app., p. 26.) *In Consolidated Edison,* the New York Public Service Commission put forth an identical argument. In rejecting that argument, this Court observed:

> The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. *To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities,* just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Dukes,* 427 U. S. 297, 303 (1976) (*per curiam*). *But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent* that rests on the special interests of a government in overseeing the use of its property. (*Consolidated Edison Co.* v. *PSC, supra,* 447 U.S. at 540.) (emphasis added).

In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978) the Court also made clear that whether government may restrict speech "by corporations turns on whether it [the regulation] can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." (*Id.,* at 786.) Moreover, "the State may prevail only upon showing a subordinating interest which is compelling" (*Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960)), and "the burden is on the government to show the existence of such an interest." (*Elrod* v. *Burns,* 427 U.S. 347, 362 (1976).) Finally, the State must not only demonstrate a compelling interest, but also must employ

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[13] In *Consolidated Edison Company* v. *Public Service Commission, supra,* 447 U.S. at 534, n. 1, this Court rejected this premise:

> Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC,* 190 U. S. App. D. C. 425, 428, 429, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley,* 60 Cal. App. 3d 123, 127-129, 131 Cal. Rptr. 350, 352-353 (1976).

means "closely drawn to avoid unnecessary abridgment. . . ." (*Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976).) The commission has not identified a state interest which can survive this test.

B. The Extra Space Is Owned By Appellant And The First Amendment Issues Cannot Be Eliminated By Simply Redefining That Ownership.

The commission incorrectly concluded that the billing envelope extra space does not belong to appellant and erred by holding that it could eliminate the constitutional issues raised by its order by simply redefining the ownership of the extra space. Redefining the property interest in the extra space, the commission asserts:

> In granting TURN limited use of the billing space, we have not required PGandE to share its private property. Rather, we have reasonably determined that something which PGandE has *treated* as its own property is, in fact, the property of PGandE's ratepayers.[14] (*Turn* v. *PGandE* Dec. No. 84-05-039, slip op., at p. 9 (Cal.PUC, May 2, 1984); app., p. 52.) (emphasis in original).

This holding is inconsistent with established First Amendment principles and with established law. (*Board of Public Utility Commissioners* v. *New York Telephone Co., supra.*)

[14] This ruling is inconsistent with *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23 (1926), where this Court stated:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or to other operating expenses, or to the capital of the company. *By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience* or in the funds of the company. (*Id.*, at 32.) (emphasis added).

This principle is a basic premise of utility regulation. (See *Philadelphia Suburban Water Company* v. *Pennsylvania Public Utility Commission*, 427 A.2d 1244 (1981); *Village of Wellsville* v. *Maltbie*, 15 N.Y.S.2d 580, 585 (1930).) For example, in *Duke Power Company*, (Opin. No. 641, 48 FPC 1384, (Dec. 12, 1972)), the Federal Power Commission (now the Federal Energy Regulatory Commission) observed: "Property paid for out of monies received for service belongs to the Company just as that purchased out of proceeds of its bonds and stocks." (*Id.*, at 395.) In *United Railways & Electric Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) [This case was overruled on other grounds in *Federal Power Commission* v. *Hope Natural Gas Company* 320 U.S. 591 (1944)], this Court confirmed that: "The property of a public utility, although dedicated to the public service and impressed with a public interest is still private property."

Below, the commission correctly states that the billing envelope is the property of appellant, but incorrectly concludes that the extra space therein is property of the ratepayers. (Dec. No. 83-12-047, slip op., at pp. 4-5; app. pp. 2-3.) But, even if the ratepayers do, in fact, own the extra space, the commission's order still violates the First Amendment.

Regardless how the ownership of that extra space is defined, the commission's regulation of what goes into appellant's envelope must still meet constitutional standards. This Court's decision in *Consolidated Edison Co.* v. *Public Service Commission, supra,* made clear that state regulation of utility billing envelopes must be governed by the state's ability to "demonstrate that its regulation is constitutionally permissible." (447 U.S. at 535.) This requirement cannot be negated, as was done by the commission below, by redefining the ownership of the extra space.

Expressly rejecting the New York Commission's assertions that it could regulate the utility's billing envelope "in the public interest" (*Id.*, at 540), the *Consolidated Edison* Court held that any regulation undertaken "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Id.*)

On the same day *Consolidated Edison* was decided, this Court decided *Central Hudson Gas and Electric Co.* v. *Public Service Commission, supra,* which firmly established that a commission cannot regulate utility speech without complying with constitutional standards. In *Central Hudson* the New York Commission completely banned an electric utility from advertising to promote the use of electricity. Although recognizing that a state may regulate utility speech, the Court, nevertheless, held that any such "regulatory technique may extend only as far as the interest it serves." (447 U.S. at 565.)

Therefore, a state cannot evade constitutional standards by merely redefining the activity (here, the extra space) regulated.[15] The overriding principles set forth in *Central Hudson*

[15] In a recent law review article, the author opined that the commission's ownership analysis was incorrect:

> The fact that ratepayers pay for envelope and postage costs is an insufficient reason to give them rights to extra envelope space. Consumers may not take property rights to a company's service and billing

(Footnote continued on following page)

are that the "State must assert a substantial interest" (*Id.*, at 564) and "the regulatory technique must be in proportion to that interest." (*Id.*) In *Central Hudson*, where the validity of state regulation of utility commercial speech was at issue, this Court set forth standards for regulation of utility speech which apply regardless of ownership of the extra space:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive. (*Id.*, at 564.)

Moreover, any "limitation on expression must be designed carefully to achieve the state's goal." (*Id.*) Ownership of the extra space is irrevelant when measuring state regulation against required constitutional standards.

(Footnote continued from previous page)

mechanism merely because they pay for the mechanism. Property rights are acquired through the creation, purchase or possession of a thing. Under the common meaning of the words, ratepayers are neither creators nor possessors of the utility's billing envelopes. The Commission's decision is more simply understood as based on the premise that the utility has no rights to extra envelope space.

The premise is in error. States may regulate public utilities, but they may not act as owners of public utility property. A public utility is a private property owner able to use and sell its property, subject to state regulation. Items purchased by the utility to provide service to the public are utility property. For example, if a utility has a franchise to install a power pole, then loses the franchise it nonetheless owns the pole and may not be denied its property without just compensation. Like a corporation's loss of charter, a utility's franchise loss has no effect on property rights. Utility property rights are those of the investors and exist apart from regulation. Without regulation, envelopes used by the utility would be utility property. Because regulation does not transfer property rights, a regulated utility's billing envelopes still belong to the utility.

. . . Clearly, billing envelopes are utility property and a transfer of property rights is required to make them ratepayer property. (Citations omitted). "Access To Public Utility Communications: Limits Under The Fifth And First Amendments," (21 *San Diego Law Review* 391, 397-399 (1984).)

C. The Interest Identified Is Neither Compelling Nor Consistent With Permissible Regulation Under The First Amendment.

The commission identified the state interest to be served as the assurance of "the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (Dec. No. 83-12-047, slip op., at p. 29; app., p. 22; (quoting Dec. No. 83-04-020, at p. 17; app., p. 103).) This goal, however, is not compelling. It falls far short of the test required for governmental regulation of speech.

In *Buckley* v. *Valeo, supra,* the government sought to promote a more balanced market place of ideas by limiting the amount that could be expended in certain political campaigns, therefore, curtailing the speech of those who had the means of communicating. The governmental interest stated in *Buckley* was analogous to the commission's interest in enhancing TURN's voice in order to achieve fuller consumer participation and understanding of commission proceedings. The *Buckley* Court found that the government's stated interest could not support infringement of speech because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." (*Id.*, at 48-49.) Here, more so than in *Buckley,* the state's interest in improving the flow of ideas is perniciously pursued by commandeering appellant's billing envelope and by appropriating some of appellant's resources to enhance TURN's voice.[16]

D. The Commission's Order Is Not Narrowly Drawn Because It Ignores Readily Available Alternatives.

This Court has long recognized that governmental regulation of speech, when permitted, must be narrowly tailored to serve the identified compelling governmental interest. If a less

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[16] For example, the Commission mandated: "In addition to ordering PGandE to make space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space." (Dec. No. 83-12-047, slip op., p. 31; app., p. 23.)

drastic means is available, or if other means are available which would not infringe First Amendment rights, more drastic means interfering with the First Amendment may not be employed. (*Shelton* v. *Tucker,* 364 U.S. 479 (1960).) In *Shelton* v. *Tucker, supra,* the Court emphasized that even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Id.,* at 488.) Even in non-First Amendment cases, this Court adheres to the doctrine that when the government has available a variety of equally effective means of achieving a given end, it must choose the method which least interferes with individual liberties.[17] The commission, however, has completely ignored this requirement and chosen one of the most restrictive methods available.

Without closely drawn means to avoid unnecessary abridgment, governmental regulation of First Amendment activity, even when permissible, cannot prevail. As emphasized by this Court in *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973):

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. [Citation omitted]. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [Citation omitted]. If the state has opened to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. (citation omitted). (*Id.,* at 59.)

Promoting participation in commission proceedings could be equally or perhaps better served by a number of other means which do not infringe upon appellant's First Amendment rights. For instance, public funding of mailings by intervenor groups could be implemented. In addition, awarding attorney or intervenor fees to successful intervenors provides a

[17] E.g., *Griswold* v. *Connecticut,* 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 507-508 (1964); *Dean Milk Company* v. *City of Madison,* 340 U.S. 349, 354 (1951); see also, Comment, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464 (1968).

direct incentive and reward for participation in commission cases.[18] Fee awards also allow the commission to ensure that the dollars received are related to the commission proceeding involved.[19] Moreover, such awards allow an unlimited number of groups, not just TURN, to be eligible to receive fees for participating in commission proceedings based upon judicially accepted standards.[20] Thus, groups representing all the different consumer interests would have a fair opportunity for funding, without violating appellant's First Amendment rights.

Pointing out that TURN has numerous alternatives for communicating its views and that the majority's decision below unnecessarily abridged PGandE's First Amendment rights, Commissioner Calvo, dissenting, correctly observed that:

> TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. (emphasis the commissioner's; Dec. No. 84-05-039, slip op., at p. 2, Calvo; dissenting; app., p. 56.)

[18] The Public Utility Regulatory Policies Act (PURPA) provided a basis for the commission to adopt rules for awarding reasonable fees and costs to intervenors making contributions in specified areas in proceedings involving electric utilities. (16 U.S.C. § 2632 (1978)) The commission has adopted rules to implement this legislation. (See Rule 76.01 et seq. of the commission's Rules of Practice and Procedure reprinted in the appendix hereto, pp. 165-182.)

[19] This would eliminate the commission's requirement that TURN establish "an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process." (*TURN* v. *PGandE* Dec. No. 83-12-047, slip op., at p. 24 (Cal.PUC, Dec. 20, 1983); app., p. 18.)

[20] On July 5, 1984, California's Governor signed onto law Intervenor's Fees and Expenses legislation which authorizes the commission to award reasonable advocate's fees, expert witness fees, and other cost of participation or intervention in any hearing or proceeding before the commission relating to utility rates. (See 1984 Cal. Legis. Serv. Ch. 297 (West); app., p. 151.)

Finally, it must be emphasized again that, even if the commission's purpose is legitimate and represents a compelling or substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (*Shelton* v. *Tucker, supra,* 364 U.S. at 488.) The commission decision below fails to pass this test.[21]

CONCLUSION

This case raises substantial national issues of first impression involving fundamental constitutional rights of appellant and numerous other similarly situated parties. To ensure that these issues are resolved in a constitutional manner, it is respectfully submitted that this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Respectfully submitted,

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[21] Just recently, in *City Council of Los Angeles* v. *Taxpayers For Vincent,* ___ U.S. ___, 104 Sup.Ct. 2118 (1984), a city council candidate, citing the advantages of placing political signs on utility poles, attacked a city ordinance which prohited such placement. Upholding the validity of the ordinance prohibiting the placement of signs on utility poles, the Court observed: "There is no reason to believe that these same advantages cannot be obtained through other means." (*Id.,* at 2123.)